Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

PETE STOLLINGS,

Petitioner,

vs.

DIRECTOR, UNITED STATES DEPARTMENT OF LABOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) Is contingency enhancement of an attorney's lodestar rate appropriate under the Black Lung Benefits Reform Act and applicable regulations?

2) If enhancement of the lodestar for risk is not appropriate in Black Lung cases, is it appropriate to factor risk into the lodestar itself?

LISTING OF PARTIES

1) Petitioner – Pete W. Stollings
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By Counsel – Roger D. Forman, Esq.
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2) Respondent[1] – Director, United States Department of Labor, Office of Workers' Compensation Programs

By Counsel – Christian P. Barber, Esq.
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[1] There are no corporate affiliations for any of the parties. Pete Stollings is an individual and the United States Department of Labor is a government agency.

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No. _____

In The

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PETE STOLLINGS,

Petitioner,

vs.

DIRECTOR, UNITED STATES DEPARTMENT OF LABOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE CASE BY OTHER COURTS OR ADMINISTRATIVE AGENCIES

There are no official reports in this case. The unofficial reports are all contained in the appendix to this petition as follows:

OPINION OF U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT AFFIRMING BENEFITS REVIEW BOARD'S DECISION IN *STOLLINGS V. DIRECTOR* DATED DECEMBER 15, 1994

DECISION AND ORDER ENTERED BY U.S. DEPARTMENT OF LABOR, BENEFITS REVIEW BOARD, MODIFYING ADMINISTRATIVE LAW JUDGE EDITH BARNETT'S ATTORNEY FEE AWARD IN *STOLLINGS V. DIRECTOR* DATED APRIL 25, 1994

U.S. DEPARTMENT OF LABOR, OFFICE OF ADMINISTRATIVE LAW JUDGES, SUPPLEMENTAL DECISION AND ORDER AWARDING ATTORNEY FEES IN *STOLLINGS V. DIRECTOR* DATED AUGUST 27, 1993

ORDER ENTERED BY U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITIONER'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC DATED JANUARY 10, 1995

JURISDICTIONAL STATEMENT

This is a Black Lung case. The United States Court of Appeals for the Fourth Circuit entered its order affirming the fee reduction to the undersigned on December 15, 1994. The order denying rehearing was entered on January 10, 1995. This Court has jurisdiction to review the judgment of the United States Court of Appeals pursuant to 28 U.S.C. §1254(1).

REGULATIONS INVOLVED

This case involves the following regulation:

20 C.F.R. §725.366(b) Any fee approved under paragraph (a) of this section shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the qualifications of the representative, the complexity of the legal issues involved, the level of proceedings to which the claim was raised, the level at which the representative entered the proceedings, and any other information which may be relevant to the amount of fee requested.

No fee approved shall include payment for time spent in preparation of a fee application. No fee shall be approved for work done on claims filed between December 30, 1969, and June 30, 1973, under part B of title IV of the act, except for services rendered on behalf of the claimant in regard to the review of the claim under section 435 of the Act and part 727 of this subchapter.

STATEMENT OF THE CASE

Pete Stollings applied for Black Lung benefits. He was awarded after a hearing by Administrative Law Judge Edith Barnett after which the undersigned filed for and was awarded a fee at a rate of $250.00 per hour. An appeal was taken and the fee was cut in half by the Benefits Review Board, which decision was affirmed by

the U.S. Court of Appeals for the Fourth Circuit, which had jurisdiction pursuant to 33 U.S.C. §921(c).

ARGUMENT

I. Is contingency enhancement of an attorney's lodestar rate appropriate under the Black Lung Benefits Reform Act and applicable regulations?

This Court in *City of Burlington v. Dague*, 112 S.Ct. 2638 (1992) ruled that enhancement of the lodestar is not permissible in contingent fee cases under environmental and similar fee shifting statutes. Based upon a misreading of *Dague*, supra, the Department of Labor and the U.S. Court of Appeals for the Fourth Circuit, in this case and previously in *Broyles v. Director, OWCP*, 974 F.2d 508 (4th Cir. 1992) have concluded that *Dague*, supra, prohibits fee enhancement in Black Lung cases before the agency and the Courts, despite a history of approving enhancements since 1980.

Fees for representing Black Lung victims are by law and regulation, not by choice of attorney contingent and based upon the following factors which are encoded at 20 C.F.R. §725.366(b):

a) The quality of representation

b) The qualifications of the representative

c) The complexity of the legal issue involved

d) The level of the proceeding to which the claim was raised

e) The level of proceedings at which the representative entered the case

f) Any other information which may be relevant to the amount of fee requested.

Prior to *Dague*, supra, contingency was considered as other relevant information. As the Benefits Review Board ruled in *Risden v. Director, OWCP*, 2 BLR 1-823, 828 (1980):

> "Although the Department of Labor has refused to recognize contingency fees, 20 C.F.R. §720.226(b), it would be unrealistic for this Board to shut its eyes to the fact that claimants' counsel are paid only when their clients are found entitled to benefits. In this context we note with approval a statement from the Court of Appeals for the Fourth Circuit that:
>
> > [t]he effective lawyer will not win all of his cases, and any determination of the reasonableness of his fee in those cases in which his client prevails must take account of the lawyer's risk of receiving nothing for his services. Charges on the basis of a minimal hourly rate are surely inappropriate for a lawyer who has performed creditably when payment of any fee is so uncertain.
>
> *McKittrick v. Gardner*, 378 F.2d 872, 875 (4th Cir. 1967). *McKittrick*, we note, is a Social Security case which is in no way binding upon the Board. We stress that our approval of this case relates to policy considerations applicable to both Social Security and Department of Labor evaluations of attorney's fee applications. The actual process of evaluation differs because Social Security recognizes contingency fees based on a percentage of benefits actually awarded, 42 U.S.C. §406(a), while we now recognize the risk of loss under the Black Lung Act

> as *one factor* of many in determining an appropriate hourly rate.
>
> We therefore hold that the deputy commissioner, when fixing an hourly rate for an attorney's fee, may consider the attorney's risk of going unpaid."

As late as December 21, 1990, the U.S. Court of Appeals was recognizing the appropriateness of enhancement in Black Lung cases in *Milburn Collieries v. Charlie R. Woodson, et al.*, No. 89-3318 (copy attached), where the Court supported and applied a multiplier, which was supported by the same party, the Director, Office of Workers' Compensation Programs of the Department of Labor who now opposes enhancement and the *Woodson* decision states as follows:

> "Milburn Colliery Company opposes any enhancement of claimant's attorneys' fees beyond counsel's customary hourly rate. The Director has responded in support of fee enhancement. The use of the contingency fee system in black lung cases has rendered such claims unappealing to attorneys for several reasons. First, the success rate is low. The overwhelming majority of black lung cases are denied. Second, settlements are not allowed in black lung cases. Thus, attorneys handling black lung cases know that if they pursue a claim, they will likely have to go through every stage of the legal process, with the strong likelihood of ultimately losing. Third, the cases move through the system slowly – most take many years to resolve, resulting in a delay in the payment of attorney's fees. Attorneys who are unsuccessful in obtaining a benefit award for their client are precluded from charging fees.

> Finally, contingency fees in black lung cases do not operate the same way as traditional contingency fee systems outside of a statutory scheme. Black lung attorneys cannot, like personal injury attorneys, offset the loss of many cases with a large award in another case. If they win, they collect payment at an hourly rate which may be lower than the rate most other attorneys charge for work which is not compensated on a contingency basis. Clearly the contingent nature of black lung fees is a factor to be considered in arriving at a reasonable fee. Consideration of this factor should not stop at simply accounting for the fact that the attorney may sometimes not recover any fees, but should account for all the effects of using a contingency fee system within the unique context of the black lung program."

Black lung is indeed different in its fee process than any other program like those covered by *Dague*, supra.

This Court in *U.S. Department of Labor v. Triplett*, 494 U.S. 715 (1990), opined:

> "And we note that the Benefits Review Board has construed the regulations of the Secretary of Labor governing the award of attorney's fees to permit consideration of the attorney's risk of going unpaid. See *Risden v. Director, OWCP*, 11 BRB 819, 824 (1980)", 494 U.S. 715, 726, 108 L. Ed. 2d 701, 717 (1990).

Triplett was decided after *Pennsylvania v. Delaware Valley Citizens Council for Clean Air*, 483 U.S. 711, 97 L. Ed. 2d 585, 107 S.Ct. 3078 (1987) (*Delaware Valley II*) in which the principal opinion was opposed to enhancement. The Court therefore recognized (after *Delaware Valley II*) that

enhancement of the lodestar was still appropriate in black lung cases.

Enhancement is still appropriate and necessary in black lung cases under the black lung regulations and this Court must say so. The reasoning of *Woodson*, supra, is ever important to assure that the fee process does not further erode the quality and availability of representation available to black lung claimants so that due process is not denied to claimants by their inability to get representation as was feared by Justice Marshall in his concurrence in *Triplett*, supra.

It is truly unreasonable to expect competent counsel to work for the reduced fee in this case. A reasonable fee as authorized by the Black Lung Act cannot possibly be based upon the same lodestar amount charged for straight non-contingent quick paying work. That is not a reasonable fee as defined by the Black Lung Act, the Black Lung regulations, the Fourth Circuit or this Court.

In this case, the Benefits Review Board applied *Dague*, supra, and *Triplett*, supra, as the governing law. In the case of *Hayes E. Browning v. Director, OWCP*, (copy attached), an unpublished decision, in Footnote 3, the Benefits Review Board notes that *Dague*, supra, is distinguishable. It appears that the Department of Labor has no concrete position on such an important issue but flip-flops for the circumstances.

The decision of the Fourth Circuit in *Broyles*, supra, is likewise wrong. It ignores the law as enunciated by this Court in *Triplett*, supra, which cited favorably to the history of fee enhancement under the black lung regulations. One could posit that the behavior of the attorneys

in *Broyles*, supra, which the Court called obscene, caused them to jump on *Dague*, supra, as a rationale for denying enhancement of attorney fees. Bad lawyers and bad fact situations make bad law.

The decision of the United States Court of Appeals for the Fourth Circuit conflicts with this Court's decisions in *Triplett*, supra, and *Dague*, supra, to a degree that this Court must exercise its authority and review this case in order to assure that this Court's legal direction is manifest and supreme.

II. If enhancement of the lodestar for risk is not appropriate in Black Lung cases, is it appropriate to factor risk into the lodestar itself?

Even if this Court does find that *Dague*, supra, applies to Black Lung Act cases, the Court should take this case and reverse the decisions below because they do not allow this attorney to properly establish his lodestar. The documents which are part of the record below show that this attorney has been granted a fee of $250.00 per hour by the Judge in this case and in seven other cases, and that three other attorneys bill and receive awards of the same range. No fee agreement can be negotiated with a client in a black lung case, see *Triplett*, supra, and 20 C.F.R. §725.365, 20 C.F.R. §802.203(f). The rate for black lung cases certainly must be higher than the range charged for non-contingent hourly work, so in establishing a lodestar, I account for contingency and delay and double my normal hourly rate of $125.00 for other cases which have no risk or delay. The approvals by the various

Administrative Law Judges recognize the appropriateness of this practice.

The Administrative Law Judge in her decision awarding the attorney fee in question in this case properly found that the incorporation of risk into the lodestar was appropriate in this case and so she awarded a fee at the rate of $250.00 per hour.

This Court recognized in *Dague*, supra, 120 L. Ed. 2d at 456, that risk of loss is ordinarily reflected in the lodestar – "either in the higher number of hours expended to overcome the difficulty, or in the higher hourly rate of the attorney skilled and experienced enough to do so." This is further reason why this Court should hear this case and reverse the illogical decisions below. The decisions below clearly conflict with the decisions of this Court.

Respectfully submitted,

ROGER D. FORMAN, ESQ.
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(304) 346-6300

Counsel for Petitioner,
Pete Stollings

APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETE W. STOLLINGS, *Petitioner,* v. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, *Respondent.*	No. 94-1640

On Petition for Review of an Order
of the Benefits Review Board.
(93-2527-BLA)

Argued: October 31, 1994

Decided: December 15, 1994

Before ERVIN, Chief Judge, HAMILTON, Circuit Judge, and MACKENZIE, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Roger Daniel Forman, FORMAN & CRANE, L.C., Charleston, West Virginia, for Petitioner, Elizabeth Ann Goodman, Office of the Solicitor, UNITED STATES

DEPARTMENT OF LABOR, Washington D.C., for Respondent. **ON BRIEF:** Thomas S. Williamson, Jr., Solicitor of Labor, Donald S. Shire, Associate Solicitor for Black Lung Benefits, Christian P. Barber, Counsel for Appellate Litigation, Jill M. Otte, Office of the Solicitor, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C., for Respondent.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Pete W. Stollings was awarded benefits under the Black Lung Benefits Act by Administrative Law Judge (ALJ) Edith Barnett in a decision and order issued May 18, 1993. On May 25, 1993, Stollings' counsel, Roger D. Forman, filed a petition for attorney's fees in the amount of $4,875.00, representing 19.5 hours of legal work compensated at the rate of $250.00 per hour, and $381.43 in miscellaneous expenses. The Director, Office of Workers' Compensation Programs objected to the hourly rate.

The ALJ rejected the Director's objections and awarded Forman the total requested fee. The ALJ found that Forman's hourly rate of $250.00 was permissibly calculated by incorporating a risk factor into a base rate of $125.00 per hour. The Director appealed the ALJ's decision to the Benefits Review Board which modified the ALJ's attorney's fee award. The Benefits Review Board

fixed Forman's lodestar fee amount at $2,437.50, representing 19.5 hours of legal services compensated at the rate of $125.00 per hour, plus $381.43 in miscellaneous expenses.

The Benefits Review Board found that Forman had increased his base hourly rate of $125.00 by a contingency multiplier of 2, achieving the same result he would have, had he improperly multiplied his lodestar fee by a factor of 2. The Benefits Review Board held such a contingency enhancement of the base hourly rate violated the principles set forth by the United States Supreme Court in *City of Burlington v. Dague,* 112 S.Ct. 2638 (1992), and by this Court in *Broyles v. Director, OWCP,* 974 F.2d 508 (4th Cir. 1992.* Specifically, in *Broyles,* this Court prohibited the use of contingency multipliers to compensate attorneys for the risk of loss in claims arising under the Black Lung Benefits Act. *Broyles,* 974 F.2d at 509. Since we expressly rejected the increase of hourly rates based on the risk of loss in *Broyles,* the ALJ erred in its assessment and the Benefits Review Board's decision must be affirmed.

AFFIRMED

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* Forman argues that this Court's decision in *Broyles* is wrong and should be overruled. However, *Broyles* was based upon a clear interpretation of the Supreme Court's decision in *Dague,* and this panel finds no reason to suggest that it be overturned.

U.S. DEPARTMENT OF LABOR

Benefits Review Board
800 K Street N.W.
Washington, D.C. 20001-8001

BRB No. 93-2527 BLA
OWCP No. 233-46-4900

PETE W. STOLLINGS Claimant-Respondent v. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Petitioner	)	DATE ISSUED: APR. 25, 1994 DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney Fees of Edith Barnett, Administrative Law Judge, United States Department of Labor.

Roger D. Forman (Forman & Crane, L.C.), Charleston, West Virginia, for claimant.

Robert P. Hines (Thomas S. Williamson, Jr., Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH and BROWN, Administrative Appeals Judges, and SHEA, Administrative Law Judge.*

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Supplemental Decision and Order Awarding Attorney Fees (91-BLA-1679) of Administrative Law Judge Edith Barnett on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge awarded claimant's counsel a total fee of $5,256.43 for 19.5 hours of legal services at an hourly rate of $250.00 plus $381.43 in miscellaneous expenses. On appeal, the Director contends that the administrative law judge erred in approving an attorney fee award that was based upon an hourly rate enhanced to account for the contingent nature of the fee. Claimant's counsel responds in support of the administrative law judge's attorney fee award.

The award of an attorney's fee is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, or an abuse of discretion. *Abbott v. Director, OWCP,* 13 BLR 1-15 (1989); *Marcum v. Director, OWCP,* 2 BLR 1-894 (1980).

The Director's sole contention on appeal is that the administrative law judge erred in approving claimant's counsel's requested hourly rate because it improperly

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* Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act, as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

incorporated a contingency multiplier. When a claimant wins a contested case, the Act provides that the employer, his insurer, or the Black Lung Disability Trust Fund shall pay a "reasonable attorney's fee" to claimant's counsel. 30 U.S.C. §932(a), incorporating 33 U.S.C. §928(a). On May 18, 1993, the administrative law judge awarded claimant benefits. On May 27, 1993, claimant's counsel filed a "Notion for Attorney's Fee," a "Memorandum in Support of Motion for Attorney's Fee" (Memorandum) with supporting documents and a fee petition. In the Memorandum, claimant's counsel indicated that his base hourly rate for handling a case of this nature before the Office of Administrative Law Judges was $125 an hour.[1] Memorandum at 1. Claimant's counsel, however, explained that his base hourly rate did not account for the contingent nature of the fee. *Id.* After the contingent nature of the fee was factored into his $125.00 base hourly rate, claimant's counsel indicated that his hourly rate for handling federal black lung cases at the administrative law judge level was $250.00 an hour. *Id.* at 5.

In determining the amount of attorney's fees to award under a fee-shifting statute, a court must determine the number of hours reasonably expended in preparing and litigating the case and then multiply those hours by a reasonable hourly rate. This sum constitutes the "lodestar" amount. *See Pennsylvania v. Delaware Valley*

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[1] Claimant's counsel explained that his $125.00 hourly rate was based on his specialized expertise in federal black lung law, the level of the proceeding and the fact that federal black lung claims raise complex factual and legal issues. Memorandum at 1.

Citizens' Council for Clean Air, 478 U.S. 546 (1986). The United States Supreme Court has held that fee-shifting statutes do not permit enhancement of a fee award beyond the lodestar amount to reflect the fact that a party's attorneys were retained on a contingent-fee basis.[2] *See City of Burlington v. Dague*, 112 S.Ct. 2638 (1992) (no contingency enhancement whatever is compatible with the fee-shifting statutes at issue); *see also Broyles v. Director, OWCP*, 974 F.2d 508, 17 BLR 2-1 (4th Cir. 1992).

Because claimant's counsel indicated that his hourly rate for handling a case of this nature at the administrative law judge level was $125.00 an hour, the lodestar amount in the instant case is $2437.50 [19.5 hours multiplied by $125.00]. We disagree with the administrative law judge's statement that claimant's counsel's standard hourly rate of $250.00, which incorporated a 50% risk factor, was proper under *City of Burlington* and consistent with the lodestar method of determining attorney fee awards. *See* Supplemental Decision and Order Awarding Attorney Fees at 2-3. By increasing his base hourly rate of $125.00 by a contingency multiplier of 2, claimant's counsel has achieved the same result he would have, had he improperly multiplied his lodestar fee by a factor of 2. Because claimant's counsel's requested attorney fee

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[2] The Supreme Court explained that the lodestar amount incorporates any compensable risk of loss as it is reflected in the increased amount of hours expended to overcome the difficulty of winning or in the higher hourly fee of the more skilled attorney needed to win the case. *City of Burlington v. Dague*, 112 S.Ct. 2638, 2641 (1992).

reflects an hourly rate adjusted to account for the contingent nature of the fee, his requested hourly rate is excessive and in violation of the principles set out in *City of Burlington* and *Broyles*. We, therefore, modify the administrative law judge's attorney fee award to reflect a total fee of $2818.93 for 19.5 hours of legal services at an hourly rate of $125.00 plus $381.43 in miscellaneous expenses.

Accordingly, the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees is modified.

SO ORDERED.

/s/ RPS
ROY P. SMITH
Administrative Appeals Judge

/s/ James F. Brown
JAMES F. BROWN
Administrative Appeals Judge

/s/ Robert J. Shea
ROBERT J. SHEA
Administrative Law Judge

U.S. Department of Labor **[SEAL]**

Office of Administrative Law Judges
800 K Street, N.W.
Washington, D.C. 20001-8002

In the Matter of PETE W. STOLLINGS Claimant v. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, Party in Interest	DATE ISSUED: August 27, 1993 CASE NO. 91-BLA-1679 OWCP NO. 233-46-4900

SUPPLEMENTAL DECISION AND ORDER AWARDING ATTORNEY FEES

On May 18, 1993, I issued a decision and order awarding benefits, and ordered the claimant to file an application for attorney fees within thirty days. On May 25, 1993, claimant's counsel, Roger D. Forman, Esq., filed his motion for an award of fees, a detailed supporting memorandum with several exhibits, and a properly documented petition seeking a total amount of $5,256.43. This amount represents 19.5 hours of attorney time at a rate of $250.00 per hour plus $381.43 in expenses. The director, OWCP, filed a response on June 8, 1993, objecting only to the hourly rate requested and to an expense item of $111.00 for office runner travel expenses. On June 14, 1993, Mr. Forman responded with an explanation of the

office runner travel expense item. I consider each objection in turn.

Counsel's Hourly Rate

The Director argues that the $250 hourly rate requested by claimant's counsel represents a 200% "multiplier" of his standard hourly rate of $125 per hour and is therefore foreclosed by the decisions of the Supreme Court in *City of Burlington v. Dague*, ___ U.S. ___, 112 S. Ct. 2638 (1992), and the Fourth Circuit Court of Appeals in *Broyles v. Director, OWCP*, 974 F.2d 508, 17 BLR 2-1 (1992) (applying *City of Burlington* to black lung cases). In *City of Burlington*, the Court refused to permit a 25% enhancement for contingency (a "multiplier" of $125%) to the plaintiffs' "lodestar" attorney's fee. The Court observed that, in determining fee awards under fee-shifting statutes, it has moved away from the contingent fee model (fee awards as a percentage of the value of the relief awarded) to the "lodestar" model (fee awards as "the product of reasonable hours times a reasonable rate"). The Court concluded that contingency enhancements would engraft a feature of the contingent fee model onto the lodestar model and, by making the setting of fees more complex and arbitrary, would encourage satellite fee litigation. The Court further observed that part of the risk of loss in a particular case, i.e. that attorney's contingent risk, is already "reflected in the lodestar – either in the higher number of hours expended to overcome the difficulty [of establishing the legal and factual merits of the claim], or in the higher hourly rate of the attorney skilled and experienced enough to do so." *Id.* At 2640-2643.

Despite some equivocal language in his brief, as I understand his argument, claimant's counsel is not seeking a "multiplier" here, i.e. an arbitrary enhancement for the contingency of this particular case like the type requested in *City of Burlington* and *Broyles*. Rather, he asserts that his established hourly rate for *all* black lung cases is $250. He supports this assertion by his submission of several decisions issued by other Department of Labor administrative law judges since 1990 awarding him attorney fees in black lung cases at his requested rate of $250. Most recently, Administrative Law Judge Lawrence E. Gray issued orders in two cases on December 16, 1992 (Nos. 91-BLA-0808, 85 BLA-5644) awarding Mr. Forman fees at a rate of $250 per hour in both; no objection to this rate was offered by any of the parties, including the Director, although both *City of Burlington* and *Broyles* had been decided earlier that year.

Claimant's counsel has also submitted affidavits of attorneys Grant Crandall and Thomas H. Zerbe which indicate that hourly rates of $250 per hour for black lung cases, while once considered high, are becoming the norm in West Virginia, because of the need to reflect the marked risk of loss in these cases. The economic risk to attorneys in this type of litigation in Mr. Forman's area is further documented by the affidavit of Jane Moran, chairperson of the West Virginia State Bar's subcommittee on Black Lung representation. She states that attorneys who were once willing to represent claimants no longer find such work profitable because of the high risk of loss, resulting in a critical problem of underrepresentation of claimants in federal black lung cases. This evidence of the

high risk of loss in these cases stands uncontroverted by the Director.

Claimant's counsel has explained that the figure of $125 per hour is a base amount that takes into account the specialized expertise required in federal black lung law, the level of the proceeding, and the fact that federal black lung claims raise complex factual and legal issues. His standard hourly rate of $250 then incorporates a 50% risk factor into this base, a calculation which appears to be perfectly proper under *City of Burlington* and consistent with the lodestar method of determining attorney fee awards. The lodestar amount Mr. Forman seeks is his established rate of $250 per hour for black lung cases multiplied by the 19.5 hours spent on this case, for a total of $4,8750 [sic]. The Director has not objected to the number of hours spent on this case, which appear to be quite reasonable in view of the results achieved. Accordingly, I conclude that the amount requested is reasonable and must be allowed.

Office Runner Travel Expenses

The Director objects to claimant's charge for office runner travel expenses of $111.00 on the grounds that the fee petition did not include pertinent information such as the dates and purpose of the trips and how they relate to the claim. In his response, counsel for the claimant has explained that the runner had to deliver and pick up medical records and X-rays for re-reading, and the charge represents mileage and tolls between Beckley and Charleston, West Virginia. The charge is reasonable and is therefore allowed.

ORDER

IT IS HEREBY ORDERED that the Director, OWCP, shall pay the sum of $5,256.43 directly to Roger D. Forman, attorney for the claimant.

/s/ Edith Barnett
EDITH BARNETT
Administrative Law Judge

EB:bdw

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. Section 725.481, any party dissatisfied with this decision and order may appeal it to the Benefits Review Board *within 30 days* from the date of this Decision and Order by filing a Notice of Appeal with the ***Benefits Review Board, 800 K. Street, N.W., Suite 500, Washington, DC 20001-8001.*** *A Copy of a notice of appeal must also be served on Donald S. Shire, Esq., Associate Solicitor for Black Lung Benefits. His address is Frances Perkins Building, Room N-2605, 200 Constitution Avenue, N.W., Washington, DC 20210.*

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
1100 EAST MAIN STREET
U.S. COURT HOUSE ANNEX
RICHMOND, VIRGINIA 23219

BERT M. MONTAGUE
CLERK

TELEPHONE
(804) 771-2213

January 10, 1995

Elizabeth Ann Goodman, Esq.
U.S. DEPARTMENT OF LABOR
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United States Department of Labor
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Washington, DC 20001

Robert Daniel Forman, Esq.
FORMAN & CRANE
105 Capitol Street
Charleston, WV 25301

Re: 94-1640 Stollings v. DOWCP
93-2527-BLA

Dear Counsel:

Enclosed is a copy of an order filed 1/10/95 in this case.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
January 10, 1995

No. 94-1640

93-2527-BLA

PETE W. STOLLINGS

Petitioner

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Respondent

On Petition for Rehearing with Suggestion for Rehearing in Banc

---

The petitioner's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,
/s/ Bert M. Montague
CLERK

FILED: December 21, 1990

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 89-3318

MILBURN COLLIERY COMPANY,

Petitioner,

versus

CHARLIE R. WOODSON; DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAM, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

ORDER

Respondent Charlie R. Woodson filed a motion for an award of attorneys' fees. Petitioner Milburn Colliery Company and the Director, Office of Workers' Compensation Program, United States Department of Labor, filed responses to the motion. Respondent Woodson also filed a reply in support of the motion. Respondent moved this court for an order granting attorneys' fees in the amount of $22,181.25 plus expenses of $297.37 against Milburn Colliery Company.

This case involves a petition for review by Milburn Colliery Company from a decision and order of the Benefits Review Board, United States Department of Labor which affirmed an award of benefits to former coal miner

Woodson under the Black Lung Benefits Act, 30 U.S.C. §§901 et seq. On May 9, 1990, this Court issued its decision in which it affirmed the BRB's order, finding the employer's argument to be without merit. The mandate of the Court issued and took effect on May 30, 1990.

Attorney's fees may be awarded in black lung cases under the authority of 30 U.S.C. §932(a), which incorporates 33 U.S.C. §928(a) and Longshoreman's and Harbor Worker's Compensation Act. Under 20 C.F.R. §725.366(a), a representative seeking a fee for services performed on behalf of a claimant must make separate applications at each administrative or appellate level at which services were performed, itemizing the services which were performed at such level. All the services itemized on respondent's fee application were performed while this case was pending before the United States Court of Appeals for the Fourth Circuit. The expenses listed on the fee application do not include the cost of printing respondent Woodson's brief which could have been taxed as costs by this Court under Rule 39(a) of the Federal Rules of Appellate Procedure.

Respondent's attorneys have itemized 84.25 hours of time and request an hourly rate of $250 an hour with an increase of 5% to account for the delay in payment. The $250 requested hourly rate is twice the amount counsel normally charge for work at the federal circuit court level, and counsel justify the double rate on the contingent nature of the fee and high loss rate in federal black lung cases.

Under 20 C.F.R. §725.366(b), a representative's fee shall be reasonably commensurate with the necessary

work done and shall take into account the quality of the representation, the qualifications of the representative, the complexity of the legal issues involved, the level of proceedings to which the claim was raised, the level at which the representative entered the proceedings and any other relevant information.

In terms of the quality of representation, respondent's counsel wrote a 40-page brief in this case and participated vigorously in oral argument before this Court on March 5, 1990. Counsel represented Woodson in the case below and has an established expertise in federal black lung litigation. One of respondent's attorneys has fourteen years of litigation experience, the last six of which involved the regular handling of federal black lung claims. In addition, counsel conducted a seminar in federal black lung litigation. In the instant case the question presented was whether the coal operator had a proper opportunity to rebut a presumption of claimant's total disability under the Black Lung Interim Regulation, 20 C.F.R. §727.203(b)(2). There was an extensive amount of lay and medical evidence in this case and the proper interpretation of the applicable regulations have been extensively litigated in this circuit and in the Supreme Court. *See e.g., Mullins Coal Co. v. Director, OWCP,* 484 U.S. 135 (1987); *Sykes v. Director, OWCP,* 812 F.2d 890 (4th Cir. 1987).

Milburn Colliery Company opposes any enhancement of claimant's attorneys' fees beyond counsel's customary hourly rate. The Director has responded in support of fee enhancement. The use of the contingency fee system in black lung cases has rendered such claims unappealing to attorneys for several reasons. First, the

success rate is low. The overwhelming majority of black lung cases are denied. Second, settlements are not allowed in black lung cases. Thus, attorneys handling black lung cases know that if they pursue a claim, they will likely have to go through every stage of the legal process, with the strong likelihood of ultimately losing. Third, the cases move through the system slowly – most cases take many years to resolve, resulting in a delay in the payment of attorney's fees. Attorneys who are unsuccessful in obtaining a benefit award for their client are precluded from charging fees. Finally, contingency fees in black lung cases do not operate the same way as traditional contingency fee systems outside of a statutory scheme. Black lung attorneys cannot, like personal injury attorneys, offset the loss of many cases with a large award in another case. If they win, they collect payment at an hourly rate which may be lower than the rate most other attorneys charge for work which is not compensated on a contingency basis. Clearly the contingent nature of black lung fees is a factor to be considered in arriving at a reasonable fee. Consideration of this factor should not stop at simply accounting for the fact that the attorney may sometimes not recover any fees, but should account for all the effects of using a contingency fee system within the unique context of the black lung program.

Although the Court will approve the use of a multiplier in increasing counsel's hourly rate, the request for double counsel's customary hourly rate is too high. A multiplier of 60% for a $200 hourly rate is consistent with recent awards by this Court in black lung appeals. *See*

Virginia Crews Coal Co. v. Director, OWCP, No. 89-2355; *Martin v. E&S Coal Company,* No. 89-3288.

Counsel has itemized 84.25 hours for services rendered while representing the claimant before this Court. Respondent Woodson had prevailed both before the Administrative Law Judge and before the Benefits Review Board. This Court quickly determined the coal operator's appeal to be without merit and affirmed the Board by a one-page unpublished per curiam opinion. Although there was nothing lacking in the quality of legal representation of Woodson, the issues presented by this case do not support the amount of time that counsel expended on appeal. Counsel has itemized 62.5 hours of review, research and writing. Travel to locate records and to come to this Court to present oral argument accounted for 17.25 billable hours. Correspondence and telephone calls each accounted for 2.25 billable hours. Respondent's brief was almost twice the size of the coal operator's opening brief and much of the factual analysis and legal argument presented to this Court was fully developed in the case below. It appears appropriate to reduce counsel's review, research and writing time by 1/3 to make the total number of awardable hours 63.41.

Awarding $200 an hour for 63.41 billable hours plus a 5% enhancement for delayed payment results in a total award of attorneys' fees of $13,316.10. The total expenses of $297.37 appear to be reasonable and the Court hereby

awards respondent Woodson a total of $13,613.47 in attorneys' fees and expenses.

For the Court – By Direction

JOHN M. GREACEN
CLERK

JOHN RISDEN Claimant-Petitioner v. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	BRB No. 78-488 BLA OWCP No. 404-12-1818 DECISION and ORDER

Digest Section **Syllabus**

103 In a case where a substantial reduction in requested fees was appealed, the Board held that neither the adjudication officer nor the attorney provided enough specific information upon which to base a review. The deputy commissioner had not explained his reasons for disallowing part of the claimed hours or for reducing the requested hourly rate, and the attorney had not provided an adequate itemization of services rendered or time spent on each type of service.

108 Since an attorney is only awarded a fee for black lung litigation when the claimant prevails, the Board found that the risk of loss under the Black Lung Act should be recognized as one factor of many to be considered "other information" in determining an appropriate hourly rate.

Appeal from the Decision and Order of John M. Bodley, Hearing Officer, United States Department of Labor.

Steven Horenstein (Legler, Lang & Kuhns), Dayton, Ohio, for the claimant.

Judith E. Wolf, Co-Counsel for Black Lung Benefits (Carin A. Clauss, Solicitor of Labor, Laurie M. Streeter, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, Chief Administrative Appeals Judge, MILLER and KALARIS, Administrative Appeals Judges.

SMITH, Chief Administrative Appeals Judge:

This is an appeal, by the claimant's attorney, from the Decision and Order (78-BLA-91) of Hearing Officer John M. Bodley,[1] awarding an attorney's fee pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1972, 30 U.S.C. §901 *et seq.* (hereinafter, the Act).

The claim for black lung benefits in this case was filed on October 18, 1973 and was informally denied on May 25, 1976. On September 29, 1976 the claimant retained Mr. Steven Horenstein as his attorney. Lay evidence of the claimant's coal mine employment dating back to 1919 as well as medical evidence of pneumoconiosis procured by the attorney resulted in an award by the deputy comissioner [sic] of $12,269.10 in accrued benefits and continuing benefits in the amount of $308.10 per month. Award of Benefits, May 6, 1977.

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[1] Mr. John M. Bodley is currently an administrative law judge with the Department of Labor. At the time the Decision and Order appealed from was filed, however, Mr. Bodley was a hearing officer and will therefore be referred to by that title throughout this decision.

Claimant's attorney filed a fee petition requesting $3,000.00, as well as $20.00 in expenses, for 41.25 hours devoted to his successful prosecution of the claim. In a letter dated August 8, 1977 the deputy commissioner awarded a fee of $1,000.00 based on 20 compensable hours at an hourly rate of $50.00.

When the attorney requested that the deputy commissioner reconsider the fee, the case was referred to the Office of Administrative Law Judges for a hearing. Letter of Steven B. Horenstein, December 14, 1977; Letter of Hearing Officer, March 21, 1978. The attorney agreed that the only issue was the reasonableness of the fee award or the value of the services rendered. He did not object to having the issue decided on the record without a hearing. Letter of attorney, March 24, 1978. The hearing officer without a hearing issued a decision on April 28, 1978, concluding that "a fee of $1,000.00 is reasonable and appropriate." Decision & Order, p. 4.

On appeal to the Board, the attorney maintains that this fee is unreasonable considering the time spent on the case, the skill required, and excellent result achieved. He states also that because his office policy is not to charge fees in black lung claims unless claimant prevails, a rate of $50.00 per hour is unreasonable in light of "the small percentage of black lung claims that were allowed under the old regulations." Petition for Review, p. 1.

The Director, Office of Workers' Compensation Programs, argues that the hearing officer's decision should be affirmed because it is legally correct, does not constitute an abuse of discretion, and is not arbitrary or capricious. Director's Letter, September 28, 1978, p. 3. The

Director submits also that the amount of the fee awarded in this case would not be altered by the promulgation of superseding regulations after the hearing officer's decision.[2] *See* 20 C.F.R. §725.417 (1977) and 20 C.F.R. § 725.366 (1979).

Although the hearing officer entered a Decision and Order finding that the deputy commissioner's award was appropriate, we treat it as null and void. It is well established that review of a deputy commissioner's discretionary act is properly undertaken by the Board rather than by a hearing officer or administrative law judge. *Mazzella v. United Terminals, Inc.*, 8 BRBS 755, BRB No. 78-173 (Aug. 31, 1978). A deputy commissioner's award of an attorney's fee is a discretionary act and therefore reviewable only by the Board. The hearing officer thus lacked jurisdiction to review an attorney's fee approved or awarded by the deputy commissioner. *Ellis v. Blake Construction Co.*, 8 BRBS 650, BRB No. 78-331 (July 31, 1978);

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[2] The Board on its own motion consolidated, for oral argument only, the instant case with *Thomas v. Director*, BRB Nos. 77-688 BLA and 79-162 BLA, and 21 other cases which presented issues concerning the Black Lung Disability Trust Fund's liability for attorney's fees. Board Order, *Thomas*, August 10, 1979. The Director subsequently conceded Trust Fund liability for attorney's fees in the instant case and 22 other cases in which no responsible operator was identified. Director's Motion to Dismiss Appeal and Response to Order of August 10, 1979, *Thomas*, August 24, 1979. The Board granted this Motion and gave Director 30 days to make further comments upon the other issues left undecided by Director's concession of August 24, 1979. Board Order, *Thomas*, September 27, 1979. The Director responded that he would stand by his original Response in the instant case. Director's Response and Request for Enlargement of Time, *Williamson v. Director*, BRB No. 79-115 BLA, November 1, 1979.

Mazzella, supra.[3] We will accordingly treat the case as an appeal to the Board from the deputy commissioner's award.

Where substantial reductions in requested attorney's fees are appealed, the Board has held that the challenging party must demonstrate that the reduction was arbitrary, capricious, or an abuse of discretion. *Hicks v. Clinchfield Coal Co.*, 5 BRBS 120, BRB No. 76-111 BLA (Nov. 26, 1976); *Perry v. Lueking Coal Co.*, 5 BRBS 620, BRB No. 76-179 BLA (March 28, 1979). The adjudication officer must set forth specific, detailed findings concerning the factors upon which the award was based. Without such discussion, there is insufficient information upon which to base a review. *Beacham v. Atlantic & Gulf Stevedores, Inc.*, 7 BRBS 940, BRB No. 77-139 (Feb. 13, 1979); *Bednarek v. I.T.O. Corp. of Baltimore*, 7 BRBS 708, BRB No. 77-140 (Feb. 15, 1978). *See also Collins v. United States Steel Corp.*, 8 BRBS 942, BRB No. 77-390 BLA (Aug. 17, 1978), for a case in which a reduction in requested attorney's fees was upheld on review. These standards are binding upon deputy commissioners. *Ellis v. Blake Construction Co., supra.*

The deputy commissioner's fee award falls short of these standards. The text of the fee award is as follows:

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[3] This principle has been included in the Secretary of Labor's regulations implementing the Act as amended by the Black Lung Benefits Reform Act of 1977 (1977 Reform Act), Pub. L. No. 95-239, 92 Stat. 95 (1978) (to be codified at 30 U.S.C. §901 *et seq.*). Section 725.366(b), 43 Fed. Reg. 36774, 89 (1978) (codified at 20 C.F.R. §725.366(b)) provides that "[i]f a fee awarded by a deputy commissioner is disputed, such award shall be appealable directly to the Benefits Review Board."

> Your application for approval of a representative's fee on the claim of John Risden for Federal Black Lung Benefits has been received and reviewed. The time and activity indicated on your itemized statement has been adjusted and we shall approve an hourly rate of $50.00 per hour on this case. We approve 20 hours as being reasonable for this case and $50.00 per hour as a reasonable rate, or the total sum of $1,000.

Letter of Deputy Commissioner, August 8, 1978

The regulations applicable to the instant case are those which were in effect at the time this fee application was filed, *i.e.*, May 20, 1977.[4] *See* 20 C.F.R. §§720.266 and

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[4] The claim in this case was filed on October 18, 1973. It is thus a so-called transition period claim, governed by Section 415 of the Act, 30 U.S.C. §925. The implementing regulations took effect on June 27, 1973 and are found at 20 C.F.R. Part 720. The attorney fee provisions thereof are at 20 C.F.R. §720.226 and 720.227 (1977).

On August 18, 1978 the regulations at 20 C.F.R. Part 720 were superseded by the Secretary's regulations published at 43 Fed. Reg. 36772 (1978) (codified at 20 C.F.R. §725). These regulations implement the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1978) (codified at 30 U.S.C. §901 *et seq.*) (hereinafter, 1977 Reform Act). Although newly enacted law, if relevant, is normally applied in the decision of pending cases, the United States Court of Appeals for the Fourth Circuit has held that the Black Lung Benefits Reform Act of 1977 "is an exception to the rule." *Treadway v. Califano*, 584 F.2d 48, (4th Cir. 1978). *See also United States Steel Corp. v. Gray*, 588 F.2d 1022 (5th Cir. 1979).

The attorney's obligations under the old and new regulations differ slightly. The superseding regulations require, for the first time, that a fee petition indicate "the professional status (e.g., attorney, para-legal, law clerk, lay representative or clerical) of the person performing such work, and the customary

720.227 (1977). The regulatory standards for evaluating fee applications set forth there provide that:

> [i]n evaluating a request for approval of a fee the following factors will be considered:
>
> (1) The services performed (including types of services);
>
> (2) The complexity of the case;
>
> (3) The level of skill and competence required in rendition of the services;
>
> (4) The amount of time spent on the case to the nearest quarter hour;
>
> (5) The level of administrative proceedings to which the claim was carried and the level at which the attorney entered the proceedings;
>
> (6) The amounts of any fees or reimbursement for expenses previously authorized, paid, or requested; and
>
> (7) Any other information or data which may be relevant to the amount of fee requested.

20 C.F.R. §720.227(a).

The attorney fee application requested $3,000.00 for 41.25 hours of work, which is a rate of approximately $73.00 per hour. The deputy commissioner disallowed 21.25 hours of the 41.25 hours which the attorney claimed

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billing rate for each such person." 20 C.F.R. §725.366(a). To apply the provisions of the superseding regulations in our review would therefore hold the attorney to a standard which did not exist when he filed his petition. We think that this would be unjust, and inconsistent with the decisions in *Treadway, supra; Gray, supra.*

for work on this case, but did not specify which hours were disallowed or why. The hourly rate was reduced from the requested $73.00 to $50.00, but, again, no explanation was given. Since there is no indication of the factors on which the award was based, we are unable to determine whether the award is reasonable and accords with law. *Bednarek, supra.* We must therefore vacate the deputy commissioner's award and remand for issuance of a new award. Upon remand, the deputy commissioner must review the fee application according to the regulatory criteria at 20 C.F.R. §720.227(a) (1977).

Claimant's attorney next argues, in effect, that because he undertakes the risk of not getting paid at all for his work on a black lung case, he should be allowed a somewhat higher hourly rate for his work on successful black lung cases than he would earn from other work. Petition for Review, p. 1. We find this point well taken.

The regulations do not list the attorney's risk of not being paid as a factor to be considered in awarding a fee for successful work. Nothing, however, prohibits consideration of this risk, and we think that it should, in fact, be considered as "other information" relevant to the amount of the fee requested. *See* 20 C.F.R. §720.227(a)(7) (1977). Such risk may justify a higher hourly rate than an attorney would earn for work for which he is paid regardless of the outcome. *Cf. Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

Although the Department of Labor has refused to recognize contingency fees, 20 C.F.R. §720.226(b), it

would be unrealistic for this Board to shut its eyes to the fact that claimants' counsel are paid only when their clients are found entitled to benefits. In this context we note with approval a statement from the Court of Appeals for the Fourth Circuit that:

> [t]he effective lawyer will not win all of his cases, and any determination of the reasonableness of his fees in those cases in which his client prevails must take account of the lawyer's risk of receiving nothing for his services. Charges on the basis of a minimal hourly rate are surely inappropriate for a lawyer who has performed creditably when payment of any fee is so uncertain.

McKittrick v. Gardner, 378 F.2d 872, 875 (4th Cir. 1967). *McKittrick,* we note, is a Social Security case which is in no way binding upon the Board. We stress that our approval of this case relates to policy considerations applicable to both social Security and Department of Labor evaluations of attorney's fee applications. The actual process of evaluation differs because Social Security recognizes contingency fees based on a percentage of benefits actually awarded, 42 U.S.C. §406(a), while we now recognize the risk of loss under the Black Lung Act as *one factor* of many in determining an appropriate hourly rate.

We therefore hold that the deputy commissioner, when fixing an hourly rate for an attorney's fee, may consider the attorney's risk of going unpaid.

The deputy commissioner's award is deficient in another respect. The attorney requested $20.00 in expenses for a report by Dr. Jerome F. Wiot which was

submitted in connection with the claim. It is provided in 20 C.F.R. §720.227(b) that

> [i]n awardeing [sic] a fee the appropriate adjudication officer shall consider and shall add thereto the amount of reasonable and unreimbursed expenses incurred in establishing the claimant's case.

The deputy commissioner did not consider this request, or award the stated amount. This issue should be dealt with on remand.

We observe, however, that the fee application itself does not comply with the applicable regulations. It is not "on a form provided for this purpose by the Office. . . ." 20 C.F.R. §720.226(c). This application is on a United States Department of Health, Education and Welfare form, with the printed words "Social Security" and "Social Security Administration" crossed out and replaced by "Black Lung" and "U.S. Dept. of Labor." In addition, the attorney lumped together all of the services rendered in this case on a given day and noted only a daily total of time spent. A typical entry is the one for September 21, 1976, which details a total of 2.5 hours spent in

> [r]eview of Black Lung Law and Regulation dealing with Black Lung claims before the department of Labor; investigation into claimant's medical history and coal mine employment; discussions with claimant.

It is provided in 20 C.F.R. §720.226(c) that a fee application "shall be supported by a complete itemized statement describing the services rendered" and that the

itemization shall contain "a description of services rendered in any proceeding under the Act, with the amount of time spent on *each* type of service." (Emphasis added). The fee request itemization does not conform with this requirement.

An attorney fee award involves the valuation of the attorney's services. If the attorney does not report the amount of time spent in each type of service, there is insufficient information to support an award. *Lindy Bros. Builders, Inc., supra.* The attorney ought to have listed separately the time he spent in legal research, discussions with claimant, and factual investigations, specifying for instance his telephone calls to investigate employment records of coal mine operators and to contact the claimant's co-workers from his coal mining years. We must therefore vacate the fee award and remand for entry of a new award upon proper application by the attorney. *Phillips v. Director,* 10 BRBS 765, BRB No. 79-121 BLA (July 31, 1979). A copy of this application should be served on the Director so that he has an opportunity to comment upon it.

The record does not indicate whether the deputy commissioner's fee award was made a lien upon the claimant's benefits. No amount is withheld from the Award of Benefits to cover an attorney's fee. The hearing officer, in the Decision and Order we have held to be null, states only that "the payment of any attorney's fee is the Claimant's obligation which may be made a lien upon [his] benefits." Decision and Order, p. 2.

The Director, however, as trustee of the Black Lung Disability Trust Fund has recently conceded the Trust

Fund's liability for attorney fees in the instant case and 22 others in which no responsible coal mine operator has been identified. *See fn. 1, supra.* Upon remand of the instant case, therefore, the attorney's fee petition should be served on the Director for his comment, and the fee awarded should be made an additional obligation of the Trust Fund.

The attorney fee award of the deputy commissioner is accordingly vacated, and the case is remanded to the Office of the Deputy Commissioner for issuance of a new attorney's fee award, consistent with this decision, upon proper application of the attorney under the provisions of 20 C.F.R. §720.226.

SO ORDERED.

Dated this 6th day of
February 1980

Benefits Review Board
800 K Street N.W.
Washington, D.C. 20001-8001

[SEAL]

BRB No. 92-1144 BLA
OWCP No. 232-16-3250

HAYES E. BROWNING Claimant-Respondent v. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Petitioner	)	DATE ISSUED: Jan. 25, 1994 DECISION and ORDER

Appeal of the Decision and Order of G. Marvin Bober, Administrative Law Judge, United States Department of Labor.

Ray E. Ratliff, Jr., Charleston, West Virginia, for claimant.

Edward Waldman (Thomas S. Williamson, Jr., Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, the United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY, Administrative appeals Judge, and SHEA, Administrative Law Judge.*

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Supplemental Decision and Order and the Order Denying Motion for Reconsideration (84-BLA-3605) of Administrative Law Judge G. Marvin Bober awarding attorney's fees on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge awarded counsel a total of $4,995 for 27.75 hours of legal services at the rate of $180 per hour. Supplemental Decision and Order at 4.

In his Order Denying Motion for Reconsideration, the administrative law judge found that the Director's Motion for Reconsideration was untimely filed. Order at p.2 (unpaginated). Considering the merits alternatively, the administrative law judge again found the hourly rate of $180 appropriate. Order at p.3 (unpaginated).

On appeal, the Director contends that the Board has jurisdiction to hear this appeal inasmuch as his Motion for Reconsideration was timely filed and, therefore, his Notice of Appeal to the Board was timely filed.[1] Director's Brief at 6-8. The Director asserts that the administrative law judge's findings on reconsideration are properly

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* Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

[1] The Board issued an order dated December 9, 1993, stating that the Director's Motion for Reconsideration and Notice of

before the Board. Director's Brief at 8-10. The Director also contends that the administrative law judge failed to comply with the Administrative Procedure Act (APA), Director's Brief at 11-12, and erroneously relied upon *The 1990 Survey of Law Firm Economics*, Altman & Weil, Inc. (1990) [hereinafter *1990 Survey*], Director's Brief at 12-15. Claimant's counsel has filed a response brief,[2] and the Director has filed a reply brief.[3]

Appeal to the Board were timely filed. Order at p.2. (unpaginated).

[2] In his response brief, counsel requests a five percent interest enhancement and asserts that he may raise this issue without filing a cross-appeal, citing *Dalle Tezze v. Director, OWCP*, 814 F.2d 129, 10 BLR 2-62 (3d Cir. 1987). Claimant's Brief at 7-8. Counsel is incorrect in stating that he may raise this issue in a response brief inasmuch as cross-appeals are required where, as in this case, the prevailing party seeks to alter or amend the final order below. *See Dalle Tezze, supra; King v. Tennessee Consolidated Coal Co.*, 6 BLR 1-87 (1983); *see also Whiteman v. Boyle Land and Fuel Co.*, 15 BLR 1-11 (1991) (*en banc*). Nonetheless, we note that the regulations prohibit the payment of interest by the Black Lung Disability Trust Fund on attorney's fees. *See* 20 C.F.R. §725.608(d); *Bennett v. Director, OWCP*, 17 BLR 1-72 (1992); *see also Library of Congress v. Shaw*, 478 U.S. 310 (1986); *Greene v. Director, OWCP*, 889 F.2d 794, 13 BLR 2-150 (8th Cir. 1989), *amended*, 892 F.2d 1385 (8th Cir. 1990).

[3] The Director asserts in his reply brief that *City of Burlington v. Dague*, 112 S.Ct. 2638 (1992) prohibits the risk of loss being considered when determining a reasonable hourly rate. Director's Reply Brief at 2-3. The *Dague* case is distinguishable inasmuch as it holds that fee enhancement through use of a contingency multiplier is not permitted under the fee-shifting statutes of the Solid Waste Disposal Act and the Clean Water Act. *Dague*, 112 S.Ct. at 2643-44.

We affirm the administrative law judge's findings regarding the number of hours for legal services as unchallenged on

The award of attorney's fees pursuant to Section 28 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §928, as incorporated into the Act by 30 U.S.C. §932(a), is discretionary and will be sustained on appeal unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *Abbott v. Director, OWCP,* 13 BLR 1-15 (1989), citing *Marcum v. Director, OWCP,* 2 BLR 1-894 (1980). *Marcum* requires a two-tier analysis; the administrative law judge must first determine whether the service was necessary to the proper conduct of the case, then he must decide whether the time expended performing the service was excessive or unreasonable. *Lanning v. Director, OWCP,* 7 BLR 1-314, 1-316 (1984).

The Director contends that the administrative law judge failed to explain fully, in accordance with the APA, his rationale for awarding claimant's counsel an hourly rate of $180. Director's Brief at 11-12. The Director also contends that the administrative law judge erroneously relied upon the *1990 Survey* to determine the appropriate hourly rate for legal services rendered prior to 1990. Director's Brief at 12-15.

The Administrative law judge stated that the $250 hourly rate seemed unreasonable in view of the established criteria outlined in Section 725.366(b). Supplemental Decision and Order at 3-4. In a footnote, the administrative law judge took judicial notice of the *1990 Survey.* Supplemental Decision and Order at 4 n.2. In his

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appeal. *See Coen v. Director, OWCP,* 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.,* 6 BLR 1-710 (1983).

Order Denying Motion for Reconsideration, the administrative law judge stated that he used the information in the *1990 Survey* "in conjunction with all of the other mentioned factors to determine the appropriate hourly rate. . . . " Order at 3.

Although the administrative law judge did not fully set forth the grounds for his reduction of counsel's requested hourly rate from $250 to $180, he did consider all the factors listed in Section 725.366(b), *see Blankenship v. Schweiker*, 676 F.2d 116 (4th Cir. 1982); *see also Gillman v. Director, OWCP*, 9 BLR 1-7, 1-9 (1986), and, therefore, provided an adequate rationale, as required by the APA, *see* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a) by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *McGinnis v. Freeman United Coal Mining Co.*, 10 BLR 1-4 (1987); *see also Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984).

Additionally, as the administrative law judge explained, he did not rely on the *1990 Survey*, as the Director contends, but simply noted the survey's figures in considering a reasonable hourly rate. Order at p.2 (unpaginated). Therefore, we affirm the administrative law judge's findings regarding the hourly rate inasmuch as they are neither arbitrary nor capricious. *See Abbott, supra*, citing *Marcum, supra; Broyles v. Director, OWCP*, 974 F.2d 508, 17 BLR 2-1 (4th Cir. 1992); *Blankenship, supra; Gillman, supra; see also U.S. Dept. of Labor v. Triplett*, 110 S.Ct. 1428, 13 BLR 2-364 (1990); *Craig v. Secretary, Dept. of Health & Human Services*, 864 F.2d 324 (4th Cir. 1989).

Accordingly, the administrative law judge's Supplemental Decision and Order and Order Denying Motion for Reconsideration are affirmed.

SO ORDERED.

/s/ Nancy S. Dolder
NANCY S. DOLDER,
Acting Chief Administrative
Appeals Judge

/s/ Regina C. McGranery
REGINA C. MCGRANERY
Administrative Appeals Judge

/s/ Robert J. Shea
ROBERT J. SHEA
Administrative Law Judge